IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 62071-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
KENNETH J. THORGERSON,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: June 8, 2009
	)	

Cox, J. — In order to establish prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. Kenneth Thorgerson's claim of prosecutorial misconduct fails because the challenged comments, when viewed in context, are either not misconduct or so minimally prejudicial that there is no likelihood they affected the jury's verdict. Accordingly, we affirm his convictions for three counts of first degree child molestation and one count of second degree child molestation.

The State charged Kenneth Thorgerson with three counts of first degree child molestation and one count of second degree child molestation. D.T., who was 19 at the time of trial, testified that when she was about 6 or 7, Thorgerson began attempting to place her hand on his penis. Over time, Thorgerson, who was D.T.'s step-father, progressed from having her touch him over his sweat pants to touching him over his underwear. When D.T. was starting fourth grade, Thorgerson succeeded in forcing her to touch his penis.

For about two years, D.T. refused Thorgerson's requests to touch his

penis. When D.T. was in sixth grade, she finally became "sick" of Thorgerson's persistent attempts and "gave him a hand job until he ejaculated." This continued "all the time" until D.T. finally put a stop to any further touching when she was in seventh grade.

When D.T. was 17, she told her boyfriend about the abuse. She also told her best friend and her brother. Eventually, D.T. told Lisa Carson, her school counselor, who contacted the police and the Department of Social and Health Services. D.T. then gave a statement to the sheriff.

D.T. testified that after she had reported the molestation, she looked in one of her notebooks and found a note from Thorgerson. The note purported to express Thorgerson's love for her, but included certain highlighted words that read "I want you to change your mind, please." D.T. believed that the message referred to sexual contact.

Thorgerson flatly denied having any improper contact with D.T. He maintained that D.T. and her boyfriend had developed a plan to lie about the molestation in order to be able to spend more time together and avoid her father's strict rules. Thorgerson claimed that he wrote the message in D.T.'s notebook in response to D.T.'s plan to quit playing softball.

The jury found Thorgerson guilty as charged. The trial court denied his motion for arrest of judgment and a new trial.

PROSECUTORIAL MISCONDUCT

On appeal, Thorgerson contends that his right to a fair trial was violated when the deputy prosecutor committed misconduct during opening statement,

cross examination, and closing argument. A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial.[1] Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict."[2] We review misconduct claims in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions.[3]

We note initially that defense counsel failed to object to virtually all of the alleged misconduct. Such errors are therefore waived unless the argument was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice.[4]

Opening Statement

Thorgerson contends that the deputy prosecutor committed misconduct during opening statement when he told the jury that "[n]o doubt it will be difficult" for D.T. to tell the jury about the charged offenses. He argues that the comment expressed a personal belief and constituted an improper appeal to the jury's passion and prejudice.

Appeals to the passion or prejudice of jurors are improper.[5] But the brief, single reference to D.T.'s possible difficulty in testifying about the charges was nothing more than an aside during the deputy prosecutor's lengthy, specific

[1] State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).
[2] State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).
[3] State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).
[4] State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).
[5] State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

description of her expected testimony. Viewed in context, the remark was not an improper expression of personal belief or emotional appeal to the jury's sympathies.

Thorgerson also contends that the deputy prosecutor improperly suggested that court rules prevented him from presenting the content of D.T.'s statement to her boyfriend about the abuse:

> And he generally wouldn't be able to testify to – about everything that's said in that conversation because the rules don't allow it. But I do expect that he'll testify the nature [sic] or the demeanor of that conversation, and he'll tell you it's a pretty sad one. He'll tell you that he encouraged her to tell someone else, and she did.[6]

Defense counsel raised no objection.

Viewed in context, the deputy prosecutor's comments focused on the substance and nature of the witnesses' expected testimony at trial, not the content of the excluded evidence. This was consistent with the general purpose of opening statement. We presume that the jury followed the trial court's instruction that opening statements were not evidence.[7] Under the circumstances, we do not find any likelihood that the comment affected the jury's verdict.[8]

Cross-Examination

Thorgerson contends that the deputy prosecutor committed misconduct in cross-examining him about the many good things he claimed to have done for

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[6] Report of Proceedings (May 19, 2008) at 161.

[7] State v. Howard, 52 Wn. App. 12, 24, 756 P.2d 1324 (1988).

[8] See id. (State's assertion during opening statement that a witness would not talk about certain matters because of marital privilege was not prejudicial misconduct).

his children. The trial court overruled defense counsel's objection that the question was "inflammatory," and the testimony continued:

> Q So regardless of whether or not a father does all these things, it doesn't change a thing if he, in fact, molested his daughter, is that -- would you agree with that statement?
> A I would agree.
> Q So what does all that have to do with this trial other than trying to make you look good?
> A Who is trying to make me look good?
> Q Well, if you paid for her clothes and you paid for her car insurance and all the things you did do, I'm not talking about things that she wanted you to do but you couldn't. All the things you did do, what does that have to do with her allegation against you?
> A That's just me being a father to my child.
> Q Right. Does it have anything to do with this trial?
> A Absolutely not.
> Q So why have we heard so much of it?
> A Because that's the type of person that I am.[9]

Thorgerson argues that the questioning was improper because it sought to demean defense counsel's trial strategy.

Although the questioning was argumentative to some extent, that is not the basis for Thorgerson's challenge on appeal. Thorgerson relies on State v. Jones[10] for the proposition that the questioning was misconduct. But the issue in Jones involved the State's questioning for the purpose of admitting inadmissible and inflammatory hearsay.[11] Here, all of the questions were based on Thorgerson's own testimony. Thorgerson has failed to demonstrate that the cross examination was misconduct.

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[9] Report of Proceedings (May 21, 2008) at 151-52.
[10] 144 Wn. App. 284, 183 P.3d 307 (2008).
[11] Id. at 295.

Closing Argument

Thorgerson contends that the deputy prosecutor committed reversible misconduct during closing argument when he again referred to evidence not admitted:

> So here's the other thing about [D.T.'s] testimony if that's -- that's really the only significant contradiction that the defense pointed out. We did make a point of asking her about all of the people she's talked to. So think about that. She told her boyfriend, she told a girlfriend, she told her brother, she told the school counselor, she told Deputy Eastep, she talked briefly to a detective. She wrote a written statement on it to the deputy. **She talked to a nurse. She's talked to people in my office and an advocate.** Others. So we're already past 10.
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> How many times was the defense able to say, well, isn't it true you told the nurse this? So you never got to hear all the statements. That's why I never got to ask the boyfriend what did she say to you? We were able to describe about the emotion, the demeanor, the timing, things of that nature. But you didn't get the statement that she says to her from me because there's hearsay rules. The defense brought some out or if they thought there was a contradiction, they were allowed to ask about that. **So out of all these versions, all these people she's talked to over a year, how many times did the defense grind out a contradiction? None**.
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> How does somebody do that? How does this bad liar tell it 10 or more times over a year with a conspiracy involving three other young people and nothing breaks down? You know how that works? It's the truth.[12]

Thorgerson argues that the deputy prosecutor not only once again referred to evidence that was not admitted, but also provided a legal explanation for the absence of that evidence and then suggested the jurors should infer that

[12] Report of Proceedings (May 21, 2008) at 174-75 (emphasis added).

the statements would have been consistent with D.T.'s trial testimony. He also claims that the references to D.T.'s statements to the nurse, advocate, and "people in my office" essentially vouched for D.T.'s credibility and shifted the burden to the defendant to present evidence.

The challenged comments were part of a longer argument addressing what was the only significant contradiction in D.T.'s statements. Lisa Carson, the school counselor, testified that D.T. told her that Thorgerson had touched her genitalia. Carson then recorded that information in her statement. At trial, D.T. testified that she had always prevented Thorgerson's attempts to touch her. D.T.'s trial testimony was consistent with the statement she made to the sheriff on the same day she had talked to Carson.

Defense counsel's failure to raise any objection strongly suggests that the challenged comments did not appear prejudicial in the context of the trial and argument.[13] The consistency of D.T.'s statements was an issue that the defense itself raised when cross-examining D.T. Defense counsel asked D.T. about all of the people that she had told about the abuse, including doctors (counselors) and her advocate. After defense counsel summarized that D.T. had given her account "numerous, numerous times," D.T. agreed with counsel's statement that "to the best of your knowledge, it stayed consistent the entire time."

To the extent that the deputy prosecutor referred to matters that were

[13] See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

outside the record, the comments were improper. But a curative instruction could easily have cut off any further discussion of such matters. Moreover, the thrust of the challenged comments and the larger argument was not that the defense had a burden to present evidence, but rather that the evidence at trial, with one exception, supported an inference that D.T.'s statements were consistent, undermining the defense theory that D.T. was a bad liar. We find no impropriety warranting a reversal.

Demeaning Defense Counsel

Thorgerson challenges the following comments during closing argument and rebuttal:

> Danielle didn't do that. She went on to tell the full truth. Now, it's not just he said, she said. I did submit it that way to you up to this point, but it's not. Now, there's no video, but there is the letter and there is the statement to Detective Wells. **And the explanation you got for both was bogus. Absolutely bogus**. Now, I can't submit them to you and say there is no other possible explanation. I can't. They're not smoking guns. But when the defense tries to sell an explanation to you that doesn't make sense, you know it's not truthful. And if there was a reasonable explanation for those items and that statement, you would have gotten an explanation that makes sense. You would have got the truthful explanation. So even though it's not a smoking gun for me to present it to you, when you look at what the defense tried to do with it, it really is. Why are they trying to make you think things are not the way they really are? **That's desperation**.[14]
> …
>
> **The entire defense is sl[e]ight of hand.** Look over here, but don't pay attention to there. Pay attention to relatives that didn't testify that have nothing to do with the case. They know her

[14] Report of Proceedings (May 21, 2008) at 171-72 (emphasis added).

> tells. Don't pay attention to the evidence. Even though, like I said half a dozen times at least and the judge has instructed you, has ordered you, your verdict has to be based on the evidence. Not on an aunt who you are supposed to believe supports the defendant who knows the complaining witness.[15]

Thorgerson argues that by using the terms "bogus" and "sleight of hand," the deputy prosecutor was attempting to demean defense counsel and improperly suggest that the defense was deliberately deceiving the jury. Although the use of such terms may raise improper negative connotations in some situations, we find no misconduct here.

A prosecutor may not impugn the character of the defendant's lawyer or disparage defense lawyers in general as a means to argue the defendant's guilt.[16] But when viewed in its entirety, the deputy prosecutor's argument focused on the specific evidence that was before the jury and suggested that it did not support the defense theory of the case. The remarks did not malign the role of defense counsel in general or disparage Thorgerson's counsel personally. The argument was not improper.[17]

Shifting the Burden of Proof

Thorgerson contends the deputy prosecutor committed misconduct by informing the jury that there was "no credible reasonable explanation to doubt

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[15] Report of Proceedings (May 21, 2008) at 195-96 (emphasis added).

[16] See State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009).

[17] See State v. Guizzotti, 60 Wn. App. 289, 803 P.2d 808 (1991) (characterization of defense argument as "smoke" was unfortunate but not error).

what [D.T.] said" and "if you believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in the case." Thorgerson claims that the deputy prosecutor improperly shifted the burden of proof by suggesting there was a presumption that D.T. was telling the truth. This argument distorts the comments.

During closing argument, the prosecutor is afforded considerable latitude to express reasonable inferences based on the evidence and to comment on the apparent credibility of witnesses.[18] Here, it is apparent that the deputy prosecutor properly asked the jury to draw inferences about D.T.'s credibility "based on the evidence in the case." Thorgerson's reliance on State v. Miles[19] is misplaced. In Miles, the court held that the deputy prosecutor committed misconduct by arguing that the jury could find the defendant not guilty only if they believed his evidence.[20] The challenged argument in this case did not present such a "false choice" to the jury.[21]

Vouching for a Witness

Thorgerson alleges that the deputy prosecutor personally testified and vouched for a witness's credibility when he referred during rebuttal to the testimony of Lisa Carson, the school counselor:

> [Defense counsel] said Danielle wouldn't know the police would be called. But then later says she sending Nick on a fielding

[18] State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).
[19] 139 Wn. App. 879, 162 P.3d 1169 (2007).
[20] Id. at 890.
[21] See id.

> expedition. Nick went out and got her. If that doesn't do it, think of this, Mrs. Carson -- I should have asked her this. My mistake. If you find that's a reason to acquit, go for it, I guess. But Mrs. Carson would have told her herself, based on the testimony you heard, she makes sure the kids know what she has to do.[22]

Defense counsel objected that the comments assumed facts not in evidence. The trial court overruled the objection and instructed the jury to "trust your own memories of what the witnesses have testified to on the stand."

The challenged comments were in response to the defense's argument that D.T. was not aware that Carson would have to tell the authorities about the alleged molestation. Although the deputy prosecutor stated that it was his mistake not to ask Carson about this issue, he then asked the jury to draw an inference that she would have told D.T. "based on the testimony you heard." That argument was supported by the evidence, including Carson's testimony that she told D.T.'s brother about the reporting requirement before he brought D.T. to talk to her. The deputy prosecutor's comments did not constitute testimony on behalf of the witness, and the trial court did not err in overruling defense counsel's objection.

Thorgerson's attempts to compare the comments in this case to the reversible misconduct in State v. Boehning[23] are not persuasive. Boehning involved outrageously flagrant misconduct, including the deputy prosecutor's reference to three counts of rape that had been dismissed and suggestion that the victim's statements supported those dismissed counts.[24] Nothing remotely

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[22] Report of Proceedings (May 21, 2008) at 196.
[23] 127 Wn. App. 511, 111 P.3d 899 (2005).
[24] Id. at 513.

as improper or prejudicial occurred in this case.

In the alternative, Thorgerson argues that he was denied effective assistance because defense counsel failed to object to much of the alleged misconduct. But because we have concluded that the challenged conduct was either not improper or not prejudicial, Thorgerson has failed to demonstrate deficient performance.[25] His claim of ineffective assistance therefore fails.

Because Thorgerson has failed to demonstrate either individual or cumulative instances of prejudicial misconduct, we affirm.[26]

/s/ Cox, J.

WE CONCUR:

/s/ Lau, J.

/s/ Dwyer, A.C.J.

[25] See In re Pers. Restraint of Davis, 152 Wn.2d 647, 716-17, 101 P.3d 1 (2004).

[26] In his reply brief, Thorgerson has moved to strike certain references in the State's response brief. The motion is denied under RAP 17.4(d) ("[a] party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits"). In any event, this court is able to decide which portions of the record to consider even without such a motion.